92-341

No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

OSCAR PORCELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an announced post-conviction position taken by the Department of Justice that the Congress did not intend that prosecutions for tax violations be brought under the federal mail fraud and RICO statutes, requires that Petitioner's conviction under those statutes for the filing of false state sales tax returns be set aside pursuant to 28 U.S.C. §2255.

2. Whether Petitioner's conviction under the federal mail fraud and RICO statutes for the filing of false state sales tax returns, which conviction required the existence of a property interest of the State in the unpaid taxes, should be set aside under 28 U.S.C. §2255 because of a post-conviction ruling by the State's highest court that the State has no property interest in unpaid taxes.

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No. _____

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI WITH APPENDIX

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit denying Petitioner relief under 28 U.S.C. §2255 is reported at 964 F.2d 1306 and appears in the Appendix to this Petition at 1a to 5a. The memorandum and order, and separate judgment, of the United States District Court for the Eastern District of New York are not officially reported and appear at 6a to 12a.

JURISDICTION

The Court of Appeals filed its decision denying relief to Petitioner under 28 U.S.C. §2255 on May 27, 1992. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The relevant portions of the following statutes are set forth in the Appendix:

(1) The mail fraud statute, 18 U.S.C. §1341, at 14a;

(2) The pertinent part of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961 - §1964, at 15a to 20a; and

(3) The statute authorizing a motion to set aside a judgment in a criminal case, 28 U.S.C. §2255, at 21a to 22a.

STATEMENT OF THE CASE

The decision of the Second Circuit dated May 27, 1992, as to which certiorari is now requested, affirmed the district court's denial of Petitioner's motion under 28 U.S.C. §2255 to set aside his 1987 conviction for 55 counts of mail fraud and one count under RICO predicated on mail fraud. Petitioner's conviction was previously upheld by the Second Circuit's 2-1 decision in 1989, reported at 865 F.2d 1352, which this Court declined to review, 493 U.S. 810 (1989).[1] After Petitioner lost the appeal from his conviction, he served six months in jail from July to December 1990, and continues to be subject to a five year probation period.

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[1] The Second Circuit's 1989 decision reversed Petitioner's conviction on six counts of mail fraud, but affirmed his conviction on the remaining 55 mail fraud counts and one RICO count under his 1985 indictment.

Petitioner and the retail gasoline station enterprise conducted through his corporation, which generates revenue of over $70 million per year, continue to be subject to a settlement agreement Petitioner made with the United States and the State of New York in lieu of a forfeiture of property ordered by the district court pursuant to the provisions of RICO. Under that agreement, Petitioner is obligated to pay $17,000,000 on account of the unpaid sales taxes of $4,755,000 and the interest and penalties thereon.

Petitioner properly seeks relief under 28 U.S.C. §2255 to set aside his conviction because he is still subject to probation, although no longer imprisoned. *United States v. Washington*, 341 F.2d 277, 280 (3d Cir.), *cert. denied sub nom., De Gregory v. United States*, 382 U.S. 850 (1965).

Petitioner now seeks certiorari based on two independent grounds for this Court's review of the denial of §2255 relief. Each ground is based on a critical and major legal development that occurred *after* Petitioner's conviction and *after* his unsuccessful appeal from his federal mail fraud and RICO conviction arising from the mailing of false sales tax returns to the State of New York, which was *not* a crime under New York's penal law.

1. **After Petitioner's conviction, the New York State Court of Appeals determined that the State has no property interest in unpaid State taxes; this removed the foundation of his conviction.**

In *State of New York v. Barclays Bank*, 76 N.Y.2d 533 (1990), rendered after Petitioner's conviction and its affirmance on appeal, the highest court of New York held that the State does not have a property interest in unpaid state taxes. This post-conviction development relates to an element that was essential to Petitioner's conviction. Under settled federal law discussed below, interference with a property interest

is necessary for a mail fraud or RICO conviction. The Second Circuit in 1989 found that the State had such a property interest and thus affirmed Petitioner's conviction.

In 1990, however, the New York State Court of Appeals ruled that the State had no property interest in unpaid state taxes. That post-conviction decision undermines the very foundation of Petitioner's 1987 federal conviction predicated on a "property" right of New York State. His conviction resulted from the federal courts' misunderstanding of New York law as subsequently determined by the highest state court. This inherently unjust conviction should now be set aside under 28 U.S.C. §2255 in light of the special circumstances of this case.

2. After Petitioner's conviction, the Department of Justice formally announced an interpretation of law under which the United States Attorney should not have prosecuted the Petitioner in this case.

On July 3, 1989, after Petitioner's conviction and its affirmance on appeal, the Department of Justice in a formal directive to all United States Attorneys stated that Congress intended that mail fraud and RICO prosecutions (absent certain "unique circumstances" not here present) should not be brought against *tax* violators. The Department's 1989 directive appears in the Appendix at 23a to 26a. In its directive, the Department of Justice stated that the mail fraud and RICO statutes should not be used to prosecute tax fraud and concluded that "Congress intended that tax crimes be charged as tax crimes," Appendix at 24a, and not as something else such as mail fraud or RICO violations. The Department of Justice specifically stated:

> Tax offenses are not predicates for RICO offenses — a deliberate Congressional decision — and

> charging a tax offense as a mail fraud charge could be viewed as circumventing Congressional intent unless unique circumstances justifying the use of a mail fraud charge are present.

Appendix at 26a.

The Petitioner now seeks relief under 28 U.S.C. §2255 to set aside his conviction for tax offenses that were not criminal under New York law, and for which the Government now says he should not have been prosecuted under the mail fraud or RICO statutes.

REASONS FOR GRANTING WRIT

I. AN ESSENTIAL PREDICATE FOR PETITIONER'S MAIL FRAUD AND RICO CONVICTION WAS A PROPERTY INTEREST OF THE STATE OF NEW YORK; NEW YORK STATE'S HIGHEST COURT HAS SINCE RULED THAT THE STATE DOES NOT HAVE A PROPERTY INTEREST IN UNPAID STATE TAXES.

This case will permit this Court to consider the legal propriety of the use by federal prosecutors of mail fraud and RICO statutes in order to collect unpaid state taxes for a state taxing authority. Such prosecutions employ the strained resources of federal criminal law enforcement authorities as a tax collection agency for states, even where, as recognized by the Second Circuit on Petitioner's earlier appeal, "the State of New York itself did not punish criminally the failure of a vendor to pay over to the State sales taxes collected from a customer . . . ." *United States v. Porcelli*, 865 F.2d 1352, 1357 (2d Cir. 1989).

The equitable considerations present in this case, as well as simple justice, combine to support Petitioner's §2255

proceeding to set aside his conviction, by reason of the post-conviction ruling by the highest court of New York in *Barclays*, 76 N.Y.2d 533. His conviction was upheld by a 2-1 decision of the Second Circuit in which even a majority of the court's panel expressed a reluctance to affirm. *Porcelli*, 865 F.2d at 1355-56. The conviction was nevertheless affirmed by the majority on the theory that under New York law, the State's right to sue to collect unpaid taxes was "property" – an essential element of mail fraud as a substantive crime and as a predicate act for a RICO prosecution. *McNally v. United States*, 483 U.S. 350 (1987). Thus, the majority of the Second Circuit in its 1989 affirmance concluded, with no New York precedent to support it, that the State of New York had a property right by reason of Petitioner's failure to pay sales taxes, even though sales taxes had never been collected from the customers and thus no funds had been segregated for the State. *Porcelli*, 865 F.2d at 1359. In its recent affirmance of the district court's denial of Petitioner's motion for relief under 28 U.S.C. §2255, the Second Circuit adhered to its "property right" theory predicated on the State's right to sue to collect unpaid taxes. *Porcelli v. United States*, 964 F.2d 1306 (2d Cir. 1992).

In 1990, the New York Court of Appeals issued its decision in *Barclays*. *Barclays* holds that the State of New York lacked a *property* interest in checks made by a taxpayer to the order of the State, which the taxpayer's accountant stole instead of delivering them to the State as instructed by the taxpayer. The court in *Barclays* ruled that the State of New York "never acquired a property interest" in the checks delivered by the taxpayer for payment to the State. *Barclays*, 76 N.Y.2d at 540-41. Thus, under the law of New York, as expressed by its highest court *after* Petitioner's conviction, the State of New York does not gain a *property* right in a fund or other means of intended payment of taxes due to the State. If, under the law of New York, a fund

targeted for payment to the State does not give the State a property right in the fund, it follows, *a fortiori*, that the existence of the State's mere right to sue to collect unpaid taxes cannot give the State a property right under the law of New York.

Petitioner respectfully submits that the *Barclays* decision means that a taxpayer's failure to pay taxes to the State of New York and the State's consequent civil remedy to bring a collection suit does *not* give the State a "property" right. The *Barclays* decision thus removes the foundational basis for Petitioner's conviction.

Petitioner's predicament highlights the basic difference in the respective functions of federal and state law. Within constitutional limits, Congress has the right to determine what action and conduct constitutes a crime under federal law. However, in enacting the mail fraud statute, which as a *sine qua non* predicate for a conviction requires that "property" be involved, *McNally*, 483 U.S. 350, Congress chose not to define what constitutes "property." Consequently, in applying the mail fraud statute, as well as RICO when mail fraud is the predicate act, the meaning of "property" is determined under applicable state law. The Second Circuit so applied this principle in affirming Petitioner's conviction. *See*, *Porcelli*, 865 F.2d at 1360 ("We turn to New York law to determine whether a vendor's failure both to collect and to remit sales taxes deprives the State of its property"). *See also*, *Butner v. United States*, 440 U.S. 48, 54 (1979) (Congress "left the determination of property rights . . . to state law"). Thus, whether Petitioner violated the mail fraud and RICO statutes is a legal question that turned squarely on the New York law of property, which was unclear at the time of his conviction. Now, however, *Barclays* has been decided and New York law has been declared by the State's highest court. Under New York law, not only was a failure to pay state tax not criminal,

but it is also clear that even an attempted tax payment, which is prevented or impeded by a theft of that payment, does not give the State a property right.

The post-conviction issuance of a ruling by the highest court of the State whose law is controlling but was unclear on an issue that was integral to the defendant's conviction, is an event that underscores the need to impose restraints on federal prosecutors who want to act as a collection agency for a state taxing authority. Such restraint is particularly important when the legislature of the State itself had not made non-payment of sales taxes criminal. Federal prosecutorial efforts were misdirected here against Petitioner. Such efforts should instead be channeled into paramount federal law enforcement activity aimed at prosecuting serious federal crimes and not into serving as a collection agency (armed with penal weapons and a debtors' prison) for a state taxing authority.

Barclays, we submit, has removed the *corpus delecti* of the federal crimes of which Petitioner was convicted. This case is analogous to the classic situation where a defendant, convicted and incarcerated for theft, can subsequently prove that the complainant never had or owned the item alleged to have been stolen from him. Where the *corpus delicti* of a crime is later found not to have existed, the courts must provide a remedy to an improperly convicted defendant.

Where there has been a change in substantive law which served as the basis for a prior federal criminal conviction, it is settled law that the conviction should be vacated in a proceeding under 28 U.S.C. §2255 to avoid a "miscarriage of justice" due to "exceptional circumstances." *Davis v. United States*, 417 U.S. 333, 346 (1974). In *Davis*, this Court held that where a defendant's conviction was based on a decision on a particular issue, a post-conviction

decision on the same issue in an unrelated subsequent case had to be taken into account in a §2255 proceeding where it effected a change in the law under which the defendant had been convicted. As stated by this Court in *Davis*:

> If this contention is well taken, then Davis' conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances."

Davis, 417 U.S. at 346 .

The exceptional circumstances of the present case are highlighted by the candid acknowledgment by the majority of the Second Circuit's panel of its reluctance to affirm Petitioner's conviction:

> We think that the prosecution of a state sales tax evader for a RICO violation pushes that law to its outer limits, especially when that tax evasion was not made criminal by the state itself at the time that the fraudulent returns were filed. We nevertheless affirm the convictions (except for six counts involving only the mailing of blank forms by the State to Porcelli's companies) by virtue of the extraordinarily broad sweep of RICO and of the federal mail fraud statute and despite *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987).

Porcelli, 865 F.2d at 1355-56.

Barclays makes clear that the State does not have a property right as a result of being prevented from receiving a tax

payment. Indeed, *Barclays'* holding is in accord with the law as pronounced by this Court almost 200 years ago when it ruled that money "not yet paid to the creditors" does not become property of the creditors. *Turner v. Fendall*, 5 U.S. (1 Cranch) 117 (1801); *see also*, *United States v. Williams*, 188 U.S. 554, 558 (1903).

The post-conviction pronouncement as to New York law in *Barclays* now calls for Petitioner's federal conviction for mail fraud and RICO to be set aside in order to correct a miscarriage of justice.

II. THE DEPARTMENT OF JUSTICE HAS DETERMINED THAT CONGRESS DID NOT INTEND THAT TAX CRIMES BE PROSECUTED AS MAIL FRAUD OR RICO OFFENSES.

1. The Department's 1989 Directive.

The United States Department of Justice, after Petitioner's conviction and its affirmance, instructed all United States Attorneys on July 3, 1989 that prosecutions for tax crimes should not be brought against taxpayers under the mail fraud or RICO statutes in the absence of specified "unique circumstances." Appendix at 26a. Thus, subsequent to Petitioner's conviction, the Department of Justice has expressly taken the position that mail fraud and RICO are not to be used to prosecute tax crimes in the absence of "certain narrowly defined circumstances" limited to victimization of individuals or victimization of the government "in a non-revenue collecting capacity." Appendix at 24a to 25a. Such circumstances are not present in this case. Even if such circumstances were present, the Department has also taken the position that a prosecution for a tax offense can never be based solely on mail fraud and RICO counts,

and that such counts must be *in addition to "applicable substantive tax charges."* Appendix at 25a. (Emphasis supplied).

Under the Department's announced position, Petitioner should never have been prosecuted for tax violations under the mail fraud and RICO statutes. Moreover, under the Department's position, even if there had been any "unique circumstances," no mail fraud or RICO prosecution was permitted unless a substantive tax crime was charged at the same time. However, no substantive tax crime was charged by the Government against Petitioner and none was even possible since the non-payment of *state* taxes to New York was itself not a substantive tax crime, either under federal or state law. In this light, it becomes clear that the prosecution and conviction of Petitioner under the mail fraud and RICO statutes for non-payment of state taxes should not have occurred.

2. **The Government cannot properly prosecute a person under a particular penal statute where the position of the Department of Justice is that Congress did not intend *that* statute to be used for such a prosecution.**

Petitioner recognizes that a governmental department may not always be bound by its own guidelines. *See, United*

States v. Caceres, 440 U.S. 741 (1979).[2] However, the 1989 directive of the Department of Justice is not a mere administrative change of policy. It is based on a fundamental and considered conclusion by the Department of Justice that

> Congress intended that tax crimes be charged as tax crimes and that the specific criminal law provisions of the Internal Revenue Code should form the focus of prosecutions when essentially tax law violation motives are involved, even though other crimes may technically have been committed.

Appendix at 24a.

Thus, after Petitioner's conviction, the Department of Justice clearly stated its position that if no crime is found under the tax code for a tax violation, then mail fraud and

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[2] The district court in a ruling dated July 6, 1990, on an application by Petitioner pursuant to 28 U.S.C. §2255, stated that the Department's 1989 directive "provide(s) no support for defendant's claim. . . . [T]he changes to the [United States Attorneys'] manual relate to the interface between RICO and the federal tax laws, not the state tax laws involved here." *See*, Appendix at 13a. The district court's memorandum dated September 29, 1991 did not comment further on the Department's directive. The Second Circuit, in affirming that decision, also did not discuss the Department's directive in its affirmance. *Porcelli v. United States*, 964 F.2d 1306.

The only discussion of the Department's 1989 directive by a Court of Appeals of which Petitioner is aware, is in *United States v. Regan*, 937 F.2d 823, *modified*, 964 F.2d 188 (2d Cir. 1991). There, while not directly ruling on the impact of that directive, the court, after reversing a RICO charge based on tax and mail fraud violations, cautioned the Government about retrying the defendants "in view of the Department of Justice's July 1989 guidelines, which substantially curtail the use of tax frauds as direct or indirect [*i.e.* mail fraud] predicate RICO offenses . . . ." *Id.* at 827. Petitioner is not aware of any analysis by any other court of appeals as to the impact of the Department's 1989 directive.

RICO should *not* be used to prosecute a tax violation, absent certain "unique circumstances" not here present. "Unique circumstances" as spelled out by the Justice Department were limited to situations in which "a tax shelter or other tax fraud" operated independently to victimize individuals, or where "the government was also victimized in a non-revenue collecting capacity." Appendix at 25a. The Department has made it clear that the failure to pay taxes, and defrauding the government in that way, were improper as predicates for mail fraud and RICO prosecutions.

The Department of Justice has set forth its understanding of the law and has taken a clear position: Congress intended no mail fraud or RICO prosecution in situations like that now before this Court. The Department of Justice should now be held to that position, and not be heard to contend otherwise. The Department's directive is based not on a mere administrative guideline or regulation intended to delineate avenues of prosecutorial energy; it is based on the Department's understanding of the intent of the Congress. It is unjust for it to depart from its position by seeking to uphold an improper conviction under the mail fraud and RICO statutes.

United States Attorneys are required by the Judicial Code to "prosecute for all offenses against the United States." 28 U.S.C. §547. This obligation is supported by the oath of office each United States Attorney must take before taking office, an oath that requires him "to execute faithfully his duties." 28 U.S.C. §544. It has now become evident, post-conviction, that the Department of Justice does not consider that actions of the type for which Petitioner was convicted, constitute an "offense against the United States" under the statutes that served as the predicate for his conviction. The continuing prosecutorial efforts to support the conviction by opposing the relief now

sought under 28 U.S.C. §2255 is, Petitioner respectfully submits, not proper.

The issue goes well beyond the simple question whether the Department has been inconsistent in following its guidelines. Here we have a situation where the Department of Justice has taken the public position that Congress intended that the crimes of which Petitioner was convicted should not be prosecuted under the very statutes upon which the Government predicated his prosecution. If a conviction can be upheld under criminal laws that the Department of Justice now specifically and openly proclaims do not apply, then, we respectfully submit, Petitioner will be deprived of due process of law.

In failing to apply the Department's position to Petitioner, the prosecution has been guilty of an unequal application of the law reminiscent of this Court's pronouncement over a century ago in *Yick Wo v. Hopkins*, 118 U.S. 220, 227 (1886):

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Once the Department of Justice reached the conclusion that tax offenses should not be prosecuted as mail fraud or RICO violations, equal justice requires that Petitioner's earlier mail fraud and RICO convictions be set aside. We respectfully request that this Court grant certiorari in order to provide simple justice to an improperly convicted person.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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August 21, 1992

APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 885 – August Term, 1991

(Submitted January 14, 1992 Decided May 27, 1992)

Docket No. 91-2485

Oscar Porcelli,

Petitioner-Appellant,

v.

United States of America,

Respondent-Appellee.

Before OAKES, *Chief Judge*, NEWMAN, *Circuit Judge*, and KEENAN, *District Judge*.*

Appeal from judgment of the United States District Court for the Eastern District of New York, Charles P. Sifton, *Judge*, denying a petition under 28 U.S.C. § 2255 (1988) on the basis of an alleged controlling change of law.

Affirmed.

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* Honorable John F. Keenan, United States District Judge for the Southern District of New York, sitting by designation.

(Vivian Shevitz, Jane Simkin Smith,
Georgia J. Hinde, New York, NY), *for Petitioner-Appellant.*

(Andrew J. Maloney, United States Attorney, Eastern District of New York, Emily Berger, Faith Gay, Assistant United States Attorneys, Brooklyn, NY), *for Respondent-Appellee.*

OAKES, *Chief Judge*:

This appeal is from the denial of a petition for habeas corpus under 28 U.S.C. § 2255 (1988) by the United States District Court for the Eastern District of New York, Charles P. Sifton, *Judge*. Oscar Porcelli's convictions on sixty-one counts of mail fraud, 18 U.S.C. § 1341 (1988), and one count of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) (1988), were upheld by a divided panel of this court, *United States v. Porcelli*, 865 F.2d 1352 (2d Cir.), *cert. denied*, 493 U.S. 810 (1989). The principal basis for the section 2255 motion and this appeal is a decision of the New York Court of Appeals, *State v. Barclays Bank of New York, N.A.*, 76 N.Y.2d 533, 563, 561 N.Y.S.2d 697 (1990), post-dating Porcelli's petition for certiorari. Porcelli claims that *Barclays* undercuts the original rationale for affirming his convictions, and that mail fraud, as defined by the Supreme Court in *McNally v. United States*, 483 U.S. 350 (1987), was not committed as the *Porcelli* panel majority thought it had been. This is said to constitute an intervening change in the law so as to require the granting of Porcelli's section 2255 application. *See Davis v. United States*, 417 U.S. 333, 346-47 (1974); *Wright v. United States*, 732 F.2d 1048, 1056-57 (2d Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985). In the interests

of judicial economy, this appeal was referred to the same panel that heard the original appeal. We unanimously affirm.

Porcelli's convictions for mail fraud and, hence, RICO, were affirmed on the basis that the filing of false sales tax returns for twelve of Porcelli's gas stations constituted federal mail fraud. 865 F.2d at 1361. It was argued, persuasively to Judge Newman in dissent, that *McNally*'s construction of the federal mail fraud statute made it inapplicable to Porcelli's conduct in that there was no "deprivation" of the State's property because there was no showing that Porcelli had collected sales taxes and failed to remit them to the tax collector. *Porcelli*, 815 F.2d at 1368-69 (Newman, *J.*, dissenting). The panel majority, however, took the view that the filing of false sales tax returns deprived the state of property in the form of choses in action. These choses in action derived from the "direct and independent" obligation under New York law placed on a vendor such as Porcelli to collect and pay the taxes to the state, whether or not the taxes were actually collected. *Id.* at 1360-61.

Barclays involved a suit by the state as payee of certain checks to recover against the depositary bank proceeds paid over endorsements forged by the taxpayers' dishonest accountant. Porcelli argues that *Barclays* stands for the proposition that "the State had *no* property interest where it did not first have possession of the tax dollars." We believe *Barclays* does not involve the question whether choses in action in state sales tax law constitute "property", and is therefore distinguishable. As stated, the case involved a dishonest accountant who computed state tax obligations for his clients, received from them checks payable to the state, forged endorsements on the checks, and deposited them in his own Barclays Bank account. After accepting the deposits, the bank collected money from the clients'

banks, and permitted the accountant to withdraw the proceeds. The New York Court of Appeals affirmed the dismissal of the state's claim against Barclays for the face amounts of the checks either under the Uniform Commercial Code (UCC) or in restitution or quasi-contract. In terms of the UCC, the Court held that "a payee must have actual or constructive possession of a negotiable instrument in order to attain the status of a holder (*see* UCC 1-201[20]) and to have an interest in it." 76 N.Y.2d at 536, 561 N.Y.S.2d at 698. In terms of relief by way of restitution or quasi-contract, the Court held: "The checks were never actually or constructively delivered to [the state]. It, therefore, never acquired a property interest in them and cannot be said to have suffered a loss." 76 N.Y.2d at 540-41, 561 N.Y.S.2d at 701.

But as Judge Sifton said in denying the section 2255 petition, the *Barclays* court was focused on the physical checks, not the taxes they represented. Our court was focused on the right of the state to be paid sales taxes by a vendor, not on checks intended as payment. Porcelli owed the state, by statute, an obligation to collect and remit taxes to the state, whether or not he actually collected the taxes from purchasers. *Porcelli*, 865 F.2d at 1361 & n.2. Barclays Bank, on the other hand, was not a vendor statutorily required either to collect or remit sales tax. In short, unlike Porcelli, Barclays Bank had no similar statutory obligation to the state to pay the taxes improperly withheld by the accountant. Whether Barclays could be required to remit those monies on some other ground is, hence, immaterial so far as Porcelli's obligations were concerned.

Porcelli has an additional argument based on *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991). We there held that an unissued license to export arms which, had it been issued, would have been obtained by fraud, was not "property" within the wire fraud statute. "The

government's interest in issuing its licenses ancillary to its regulatory programs" was said to be "no different than its interest in propounding and enforcing its other regulations with broad based applications that do not include the issuance of licenses." 924 F.2d at 417. The court refused to consider the government's argument that its right to subject the arms intended for illegal shipment to seizure and forfeiture under statute and regulations was an "intangible property right of which it was deprived by appellants' fraudulent acquisition of the export licenses" because the district court did not instruct the jury on that theory. 924 F.2d at 418. Porcelli argues that the government's interest in *Schwartz* is "little different from the tax claim that New York State had in this case." But the collection of taxes in *Porcelli* was not aimed at regulating the gasoline industry, it was intended to gain revenue. As the government suggests, if an analogy is appropriate, the state taxes in *Porcelli* are more like the arms in *Schwartz* themselves, the search and seizure of which the *Schwartz* court did not reach, as opposed to the intangible piece of unissued paper.

Judgment affirmed.

Date of Entry: May 27, 1992

APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, CR-85-00756

- against - MEMORANDUM AND ORDER

OSCAR PORCELLI,

Defendant.

----------X

SIFTON, District Judge.

This matter is currently before the Court on defendant's application under 28 U.S.C. §2255 to vacate convictions under the federal mail fraud and RICO statutes. 18 U.S.C. §§1341, 1962(c). For reasons discussed below, the application is denied.

Oscar Porcelli was convicted by this Court of RICO and federal mail fraud based on his fraudulent filing of multiple New York State sales tax returns for gas stations owned in whole or in part by Porcelli or one of his corporations. This conviction was affirmed by the Court of Appeals in an opinion addressing a variety of legal challenges by the defendant. *United States v. Porcelli*, 865 F.2d 1352 (2d Cir.), *cert. denied*, 110 S. Ct. 53 (1989).

Petitioner now asserts that a case decided by the New York State Court of Appeals subsequent to his appeal establishes that the United States Court of Appeals misinterpreted an issue of New York law vital to its affirmance of his conviction and that, accordingly, habeas

corpus relief is required. Whatever the procedural validity of petitioner's method of rearguing his appeal, the issue decided by the New York State Court of Appeals in *State v. Barclays Bank of New York*, 76 N.Y.2d 533, 561 N.Y.S.2d 697 (1990), is not the same issue as that relied upon in the United States Court of Appeals' opinion. Accordingly, the petition is denied.

DISCUSSION

The mail fraud statute, 18 U.S.C. §1341, is limited to the protection of property rights. *McNally v. United States*, 483 U.S. 350 (1987); *United States v. Porcelli*, *supra* at 1359. The Court of Appeals for the Second Circuit upheld Porcelli's conviction on the theory that the state sales taxes that defendant should have collected but did not collect were "property" belonging to New York State. *Id.* at 1361. In the language of the majority, Porcelli deprived New York of its property: "the choses in action represented generally in the state tax law." *Porcelli*, 865 F.2d at 1361. These choses in action existed because Porcelli had a legal obligation to pay the taxes to New York State regardless of whether he collected them from his customers or not. *Id.*

The case relied on by petitioner, *State v. Barclays Bank of New York*, 76 N.Y.2d 533, 561 N.Y.S.2d 697 (1990), also dealt with tax fraud. Caliendo, an accountant, received from his clients checks payable to New York State taxing entities. Caliendo forged endorsements on these checks and deposited them in his own bank account. The state sued Caliendo's bank for return of the monies. *Id.* at 536. The New York Court of Appeals denied the state's claims under the UCC and in quasi-contract.

With respect to the quasi-contract claim, the court held that the state had no rights against the bank because no unjust enrichment had occurred since unjust enrichment

requires a loss by the plaintiff. *Id.* at 701. Since the checks had never been actually or constructively delivered to the state, the state had no property interest in those checks and had not suffered a "loss" of its property.

With respect to the claim under the UCC, the court held that the state had no rights against the bank as a holder because it had never had actual or constructive possession of the instruments. *Id.* relying on UCC 1-201.

Finally, the court rejected a conversion argument. "An instrument is converted when . . . (c) it is paid on a forged indorsement." UCC §3-419. The court held that UCC conversion also requires actual or constructive possession of the checks by the state. *Barclays*, at 699.

Porcelli argues that the *Barclays* court held that taxes are not "property" of New York State until the state receives actual or constructive possession of the payment. He relies on the following language from the quasi-contract section of the opinion.

> "The checks were never actually or constructively delivered to plaintiff. It, therefore, never acquired a property interest in them and cannot be said to have suffered a loss."

Id. at 701.

This argument is specious. The New York Court of Appeals was discussing the physical checks, not the taxes they represented. The Second Circuit was discussing the right to be paid taxes, not possession of checks. These two items are different; the government is entitled to its tax revenue but not to specific checks which are intended as payment.

Central to the distinction is the difference in the relationship of the two defendants to the underlying obligation to New York State.

Porcelli himself owes New York State an obligation to collect and remit taxes. Under New York law a vendor who has been required to collect sales tax from his retail customers is himself a taxpayer covered by the state's lien laws. *Porcelli*, at 1360-61.

As mentioned above, the vendor has an obligation to remit the taxes even if he has not actually collected them from his retail customers; the vendor is the state's agent for the collection of sales tax. *Porcelli*, 865 F.2d at 1361. This obligation is a chose in action, property, which the petitioner has withheld from New York State by mailing fraudulent tax returns. *Id.* at 1361 & n.2.

Barclays Bank is not a vendor statutorily required to either collect or remit sales tax. Barclays is not the state's agent for the collection of the taxes at issue. Therefore, under the Second Circuit's reasoning in *Porcelli*, Barclays Bank does not have any obligation to pay New York State the taxes withheld by Caliendo.

Whether or not Barclays Bank could be required to remit tax monies to New York State on another ground is irrelevant to Porcelli's obligation as a vendor of goods covered by the sales tax laws. The New York Court of Appeals has not, therefore, changed the law relied on by the Second Circuit Court of Appeals.

As an aside to his principal argument, petitioner claims that the Second Circuit established a new definition of "property" under §1343 in *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991). That case as well is different. In *Schwartz* the Court of Appeals held that unissued licenses to export arms are not property under the wire or mail fraud statutes. 18 U.S.C. §§1341, 1343. It declined to reach the issue whether the right to seizure and forfeiture of arms shipped without a proper export license was such property. *Id.* at 416-18.

In any event, after *Schwartz* was decided on January 15, 1991, the Second Circuit cited *Porcelli* for the proposition attacked by petitioner. *United States v. Helmsley*, 1991 WL 140994, 21 (2d Cir. July 30, 1991).

Additionally, petitioner cites several pre-*Porcelli* cases as relevant to the definition of property, for example, *Carpenter v. United States*, 484 U.S. 19 (1987); *United States v. Johnson*, 268 U.S. 220 (1925); *Mazzuka v. Bank of New York*, 53 Misc. 2d 1053, 280 N.Y.S.2d 495 (Queens Co. Civ. Ct. 1967). These cases were decided well before the Second Circuit's affirmance of Porcelli's conviction and are not intervening changes in the law.

Petitioner's brief in reply contains an additional throwaway argument to the effect that the Second Circuit's opinion in *Porcelli* is internally contradictory since it states that "Porcelli deprived New York of that property [the chose in action]" and that "[t]he fact that the state [still] has a . . . chose in action . . . may mean that it has not . . . been deprived of that chose in action."

This argument is the product of disingenuous editing. The full sentence quoted in context reads:

> "The fact that the State has a claim, a chose in action, for the difference between what was paid and the tax shown on the false return may mean that it has not finally been deprived of that chose in action. However, the fact remains that until the fraud was discovered it had been deprived of its property."

Porcelli, 865 F.2d at 1361.

The United States Court of Appeals merely held that delaying the availability of the state's chose in action for the taxes was a deprivation even though the deprivation was not permanent. *Porcelli*, at 1361 & n.2.

For reasons discussed above, petitioner's application under 28 U.S.C. §2255 to vacate convictions is denied.

The Clerk is directed to mail a copy of the within to all parties.

SO ORDERED.

Dated: Brooklyn, New York
September 29, 1991

/s/
United States District Judge

Date of Entry: October 11, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

OSCAR PORCELLI,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

----------X

JUDGMENT

CV 91-3780 (CPS)
(RELATED TO:
CR 85-756))

A Memorandum and Order of Honorable Charles P. Sifton, United States District Judge, having been filed on September 27, 1991 denying petitioner's application under 28 U.S.C. §2255 to vacate conviction, it is

ORDERED and ADJUDGED that petitioner take nothing of respondent; and that petitioner's application under 28 U.S.C. §2255 to vacate is denied.

Dated: Brooklyn, New York
September 30, 1991

/s/
ROBERT C. HEINEMANN
Clerk of Court

Date of Entry: October 9, 1991

APPENDIX C

APPENDIX C

United States of America,

v.

Oscar Porcelli, Defendant.

No. CR-85-0756.

United States District Court, E.D. New York

July 6, 1990

DECISION AND ORDER

SIFTON, District Judge.

To the extent that defendant's application to vacate his conviction pursuant to 28 U.S.C. § 2255 deals with matters not disposed of earlier, it is without merit.

The only novel material presented by defendant at this time relates to "bluesheets" issued by the Department of Justice in June and July 1989 to supplement the United States Attorneys' Manual. These bluesheets provide no support for defendant's claim that the decision to prosecute him in 1985 was arbitrary. In any event, the changes to the manual relate to the interface between RICO and the federal tax laws, not the state tax laws involved here.

Petitioner's application to vacate his conviction is denied.

The Clerk is directed to mail a copy of the within to all parties.

SO ORDERED.

APPENDIX D

APPENDIX D

The mail fraud statute, 18 U.S.C. § 1341 (1982), provides:

§ 1341. Frauds and swindles

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

In 1988, subsequent to Petitioner's conviction, 18 U.S.C. § 1346 was enacted so as to include within 18 U.S.C. § 1341 a scheme "to deprive another of the intangible right of honest services."

APPENDIX E

APPENDIX E

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 - § 1964 (1982), provided in pertinent part:

§ 1961. Definitions

As used in this chapter –

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating

to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

* * * * *

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

* * * * *

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including,

but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

The Act was amended in 1984 and 1986 in ways not pertinent to the questions presented. *See*, Pub. L. No. 98-473 (1984); Pub. L. No. 98-547 (1984); Pub. L. No. 99-570 (1986); Pub. L. No. 99-646 (1986).

APPENDIX F

APPENDIX F

The statute authorizing a motion to set aside a judgment in a criminal case, 28 U.S.C. § 2255 (1982), provides:

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set

the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

APPENDIX G

APPENDIX G

The following is the directive of the United States Department of Justice issued in July 1989:

TO: Holders of United States Attorneys Manual Title 6

FROM: United States Attorneys Manual Staff
Executive Office for United States Attorneys

Shirley D. Peterson
Assistant Attorney General
Tax Division

RE: *Charging the Filing or Causing the Filing of False Income Tax Returns as Mail Fraud and/or as Mail Fraud Predicates to a RICO Charge*

NOTE:
1. This is issued pursuant to USAM 1-1.550.
2. Distribute to Holders of Title 6.
3. Insert at end of USAM Title 6.

AFFECTS: USAM 6-4.211(1)

PURPOSE: This bluesheet implements prosecutive policy concerning the use of mail fraud charges and mail fraud predicates for RICO where the filing of false tax returns or forms is involved

The following supplements 6-4.211 Tax Division Jurisdiction with a new subsection 6-4.211(1) Filing False Tax Returns: Mail Fraud Charges or Mail Fraud Predicates for RICO.

The authorization of the Tax Division is required before charging mail fraud counts either independently or as predicate acts to a RICO charge: (1) when the only mailing charged is a tax return or other internal revenue form or document; or (2) when the mailing charged is a mailing used to promote or facilitate a scheme which is essentially only a tax fraud scheme (e.g., a tax shelter).[1] Such authorization will be granted only in exceptional circumstances as explained below.

The filing of a false tax return, which almost invariably involves a mailing, is a tax crime chargeable under 26 U.S.C. 7206(1) (if the violator is the taxpayer) or 26 U.S.C. 7206(2) (if the violator is, for example, a tax return preparer or tax shelter promoter). It is the position of the Tax Division that Congress intended that tax crimes be charged as tax crimes and that the specific criminal law provisions of the Internal Revenue Code should form the focus of prosecutions when essentially tax law violation motives are involved, even though other crimes may technically have been committed. See, *United States* v. *Henderson*, 386 F.Supp. 1048, 1052-53 (S.D.N.Y. 1971).[2]

Under certain narrowly defined circumstances, however, a mail fraud prosecution predicated on a mailing of an internal revenue form or document, or where the scheme involved is essentially a tax fraud scheme, might be

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[1] A scheme does not fall in the latter category if it is *designed* to defraud individuals or to defraud the government in a non-revenue collecting capacity.

[2] The Ninth Circuit in *United States* v. *Miller*, 546 F.2d 1204, 1216 (9th Cir. 1976) *cert denied*, 430 U.S. 930 (1977) in footnote 17 stated a contrary position, but did not analyze the issue as it was not squarely presented. The case involved corporate diversion and possible fraud on creditors as well as tax evasion.

appropriate in addition to, but never in lieu of, applicable substantive tax charges. See, *United States* v. *Mangan*, 575 F.2d 32, 48-49 (2d Cir. 1978) (where the defendant filed false refund claims on behalf of others, thereby acting more like a thief in the traditional sense). Such a situation could arise in a tax shelter or other tax fraud case, when individuals, through no deliberate fault of their own, were demonstrably victimized as a result of a defendant's fraudulent scheme and use of a mail fraud charge is necessary to achieve some legitimate, practical purpose like securing restitution for the individual victims. The fact that a defendant committed conduct which independently victimized individuals is to be reflected in the mail fraud allegations in the indictment. Mail fraud charges could also be used in a tax fraud case when the government was also victimized in a non-revenue collecting capacity. See, *e.g.*, *United States* v. *Busher*, 817 F.2d 1409, 1412 (9th Cir. 1987) (case involving primarily false contract claims). However, to the extent victimization of third parties constitutes an exception to the general rule, the evidence must demonstrate direct, substantial victimization as opposed to a general or theoretical harm to a general class of victims.

Normally, in a tax shelter case, the mere imposition of interest and penalties on the investors will not constitute sufficient victimization to warrant the use of mail fraud charges in addition to merits to determine whether the degree of culpability of the individual investors is such as to treat them more as victims than participants in the particular scheme. Among the factors to consider are the existence of bona fide pending civil suits against the promoters by the investors, the nature and degree of misrepresentations made to the investors, and the degree of independent losses beyond the tax liability.

A similar policy will be followed with respect to the filing of RICO charges predicated on mail fraud charges

which in turn involve essentially only a tax fraud scheme. Tax offenses are not predicates for RICO offenses — a deliberate Congressional decision — and charging a tax offense as a mail fraud charge could be viewed as circumventing Congressional intent unless unique circumstances justifying the use of a mail fraud charge are present.

However, once a decision has been made by the Tax Division to authorize mail fraud charges, the decision whether to authorize a RICO charge in turn based on these mail fraud charges is one for the Criminal Division to make.

For a determination as to whether a mail fraud charge predicated on the mailing of internal revenue forms or documents is appropriate, the Tax Division should be consulted early in the investigation rather than waiting until a last minute decision is needed.